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Filing date: **02/20/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91183140
Party	Plaintiff Moby's Auto Spa, Inc.
Correspondence Address	James F. Keenan, Jr. Bernstein, Shur, Sawyer & Nelson 100 Middle Street Portland, ME 04104 UNITED STATES jkeen@bssn.com
Submission	Opposition/Response to Motion
Filer's Name	John G. Osborn
Filer's e-mail	josborn@bernsteinshur.com
Signature	/s/ John G. Osborn
Date	02/20/2009
Attachments	02-20-09 - OBJECTION to Applicant's Motion to Reopen Discovery.pdf (7 pages)(32271 bytes) 02-20-09 - Exhibit A to Opposition.pdf (6 pages)(144202 bytes) 02-20-09 - Exhibit B to Opposition.pdf (3 pages)(65773 bytes) 02-20-09 - Exhibit C to Opposition.pdf (6 pages)(126808 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MOBY’S AUTO SPA, INC.)	
)	
Opposer,)	Mark: WHALE WASH
)	
v.)	Serial No.: 77/205,602
)	
WHALE WASH, LLC,)	Opposition No. 91183140
)	
Applicant.)	

OPPOSITION TO APPLICANT’S MOTION TO REOPEN DISCOVERY

Opposer, Moby’s Auto Spa, Inc. (“Moby”), hereby opposes Applicant’s Motion to Reopen Discovery (“Motion”). Applicant bases its Motion on the grounds that Moby’s discovery responses raised “new” issues that need investigation and that Applicant can show excusable neglect. Both arguments are facially flawed and arise only from Applicant’s misunderstanding of the relevant issues in this case and Applicant’s conscious decision to wait until the last day of the discovery period to serve discovery requests. Accordingly, because Applicant can neither raise “new” issues nor demonstrate excusable neglect, its Motion to Reopen Discovery should be denied.

I. Applicant Has Raised No New Relevant Issues Requiring Discovery

Applicant rests its Motion on the claim that “documents produced in response to the parties’ discovery demands” raise eight (8) new issues “bearing directly on the instant suit.” Motion, p. 2-3. That claim is facially incorrect, for a number of reasons. First, neither party in fact produced any documentation. It is therefore impossible for these issues to have been raised by produced documents. Second, as set forth in more detail below, every one of the eight issues

referenced by Whale Wash are either irrelevant or are far from new. Those issues are addressed *in seriatim* below.

1. Whether Opposer uses other equipment and materials inclusive of manufacturers with any model numbers or product specifications that are unique to their trademark.

RESPONSE: This issue has absolutely nothing to do with the Opposition and is not implicated in any manner by Moby's discovery responses. Moby listed no specific equipment or materials allegedly unique to Moby's registered Marks.

2. Whether Opposer has or intends to seek action against any other companies for infringement of use of any of the unique equipment and materials listed previously.

RESPONSE: This issue has absolutely nothing to do with the Opposition and is not implicated in any manner by Moby's discovery responses. Moby listed no specific equipment or materials allegedly unique to Moby's registered Marks. Moreover, Applicant requested documents in its first document requests "relating to any litigation or other conflicts concerning the Whale Wash Mark. See Applicant's First Request for Production of Documents, attached hereto as Exhibit A, p. 4. This issue is hardly new.

3. Whether Opposer can provide documentation or evidence (including specific dates when the facts were first established) referencing all areas in which their trademark is associated with the cleaning and maintenance of oversized vehicles.

RESPONSE: This issue was not raised by Moby's discovery responses. Applicant did not request documents relating to the cleaning and maintenance of oversized vehicles. See Exhibit A. The documents produced by Moby do not reference the cleaning and maintenance of oversized vehicles in any manner. Accordingly, this is not a newly raised issue, nor is it

relevant to the issue of whether Applicant's registration, on its face, causes the likelihood of confusion with Moby's Marks.

4. Whether Opposer can provide evidence of when he was first made aware of Applicant's mark and how it was brought to Opposer's attention.

RESPONSE: This issue is far from novel, and has already been resolved. Moby sent its first correspondence to Applicant on September 6, 2007, referencing Applicant's Whale Wash application, and stating that it had recently learned of the registration using its watch service. That letter attached the relevant watch notice, making it clear to Applicant exactly when and how Moby learned of "Applicant's mark." See Exhibit B.

5. Whether Opposer can provide a list of all witnesses and/or customers that they are aware of and are not party to this litigation, which can testify to having had any degree of confusion between the respective trademarks in commercial use.

RESPONSE: Again, this issue is far from novel. Applicant's first document requests sought "all documents evidencing actual confusion by any person or business concern involving Opposer's and Applicant's use of the Whale Wash mark" and "all documents evidencing, showing or tending to show, or which might lead to a belief as to the existence of any actual confusion between Opposer's and Applicant's use of the Whale Wash mark." See Exhibit A, p. 5. This "new" issue is merely a close paraphrase of an earlier discovery request. Moreover, evidence of actual confusion is not relevant to an opposition based on likelihood of confusion between two registered marks. That issues should be resolved within the corners of the applicable registrations and applications.

6. Whether Opposer can provide an estimate of damages incurred for the alleged infringement to date along with any supporting documentation to justify the estimate.

RESPONSE: This is wholly irrelevant to an opposition based on likelihood of confusion between two registered marks and is almost certainly a fishing expedition seeking to ascertain Applicant's exposure to any federal trademark infringement suit filed by Moby.

7. Whether Opposer can provide documentation of any future plans, blue prints or business forecasts (including dates with supporting documentation when each was established) for which it intends the allegedly infringed upon trademark to be used outside of the state county, country in which it is currently being used or in any area closely aligned with Applicant's consumer base.

RESPONSE: This is neither new nor relevant to this proceeding. First, Applicant's First Set of Interrogatories sought identification of "all geographic areas in which Moby's has sold and/or advertised, or intends to sell and/or advertise its goods and services under the Whale Wash mark." See Applicant's First Set of Interrogatories, attached hereto as Exhibit C, p. 4. Whale Wash could very easily have asked for corresponding documentation. It chose not to do so. Moreover, in a proceeding such as this, the Board should presume overlapping geographic areas, making such discovery requests irrelevant.

8. Whether Opposer can provide a list of any parties for which they have licensed their trademark, of who have requested to license their trademark and under what terms and conditions the license exists.

RESPONSE: This is neither new nor relevant. In its first document requests, Applicant requested "all documents relating to any person or business concern licensed or authorized to use the Whale Wash mark besides Moby's." See Exhibit A, p. 6. Accordingly, Applicant's statement that this is a "new" issue is facially erroneous.

As made clear above, not only are none of these eight issues new and relevant, but Applicant's claims to the contrary are clearly refuted by its own discovery requests, raising questions about the good faith nature of Applicant's Motion.

II. Applicant Has Failed to Demonstrate Excusable Neglect

The irony inherent in Applicant's Motion is highlighted by the following excerpt from the Motion.

The reason for the delay in this case was not within the reasonable control of the movant and the movant has proceeded in good faith. Applicant was only made aware of the need for additional discovery upon receipt of Opposer's responses to its discovery demands. Had Opposer sent its responses prior to the deadline for discovery, Applicant may have had time to draft supplemental demands.

Motion, p. 6 (emphasis added). This statement, frankly, is ridiculous. Applicant's discovery requests are dated December 1, 2008, the final day of discovery in this matter, and were not received by Opposer until after the deadline had passed, *via* email on December 2nd and *via* US mail on December 10th due to an improper mailing address. Opposer responded on January 5, 2009, within the proper response period. Applicant has absolutely no grounds to blame its delays on Opposer.

Applicant's Motion is the product of one thing and one thing only, Applicant's conscious choice not to file discovery requests until the final day of the discovery period. To quote this Board's own Rules:

Mere delay in initiating discovery does not constitute good cause for an extension of the discovery period. Thus, a party which waits until the waning days of the discovery period to serve interrogatories, requests for production of documents and things, and/or requests for admission will not be heard to complain, when it receives responses thereto after the close of the discovery period, that it needs an extension of the discovery period in order to take "follow-up" discovery.

TBMP § 403.4. *See also American Vitamin Products Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1316 n. 4 (TTAB 1992). Applicant's efforts to blame its situation on Opposer are simply absurd and should be rejected by this Board.

III. Conclusion

Applicant's Motion is fatally flawed in so many ways that it raises questions of Applicant's good faith in filing it. Contrary to Applicant's direct assertion, the Motion cannot be based on the review of produced documents, because no documents were produced in discovery. Contrary to Applicant's direct assertion, the "new" issues raised were either raised in Applicant's earlier discovery requests or are wholly irrelevant to a determination that can rest solely on Opposer's registrations and Applicant's application. Finally, contrary to Applicant's direct assertion, the only party to blame for Applicant's situation is Applicant itself, and this Board's own rules directly reject Applicant's excuses for its tardiness. Accordingly, Opposer Moby's Auto Spa, Inc. respectfully requests that this Board deny Applicant Whale Wash's groundless Motion to Reopen Discovery.

Date: February 20th, 2009.

Respectfully submitted by: /s/ John G. Osborn
John G. Osborn, Esq.
James F. Keenan, Jr., Esq.
Attorneys for Opposer

BERNSTEIN SHUR
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Portland, Maine 04104
207-774-1200
jkeenan@bernsteinshur.com
josborn@bernsteinshur.com

CERTIFICATE OF SERVICE

I hereby certify that on February 20th, 2009, ***Objection to Applicant's Motion to Reopen Discovery*** was served upon counsel for Applicant, Whale Wash, LLC, *via* e-mail and First Class mail at the following address:

Jose Martinez, Jr., Esq.
Martinez Law
76 Ninth Avenue, Suite 1110
New York, New York 10011
Jose@martinezl原因pllc.com

/s/ John G. Osborn
John G. Osborn, Esq.
Attorney for Opposer

BERNSTEIN SHUR
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PO Box 9729
Portland, ME 04104-5029
207-774-1200
josborn@bernsteinshur.com

IN THE UNITED STATES PATENT AND TRADEMARK
OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application Serial No. 77205602

Filed By WHALE WASH, LLC on June 13, 2007

For the mark WHALE WASH

-----X

MOBY'S AUTO SPA, INC.

Opposer,

Opposition No.:
91183140

-against-

WHALE WASH, LLC.

Applicant.

-----X

APPLICANT'S FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS

The Applicant, WHALE WASH, LLC ("Applicant"), by its attorneys, MARTINEZ LAW, PLLC, as and for its First Request For The Production Of Documents pursuant to the provisions of 37 C.F.R. § 2.120 and Rule 34 of the Federal Rules of Civil Procedure, hereby requests from MOBY'S AUTO SPA, INC. ("Moby's"), the production of the following communications, documents and files, on or before thirty days after service.

A. Moby's means Opposer, its predecessors or assignors, affiliated and related companies, and employees, agents or representatives of Moby's.

B. As used herein, the term "document" is used in the broadest sense and includes, but is not limited to, the following items, whether hand-written or typed or printed or recorded or reproduced by any process, namely: agreements; communications (including intra-company

communications); memos; statements; notes (whether formal or informal); correspondence; telegrams; cables; telexes, faxes; telephonically transmitted tangible communications; memoranda; records; books; summaries or records of telephone conversations; telephone message slips (including those which indicate only that a call was received or made); summaries or records of conversations or interviews; diaries; appointment books; desk calendars; wall calendars; forecasts; statistical statements; accountants work papers; graphs; charts; accounts; minutes or records of meetings or conferences; reports and/or summaries or interviews; reports and/or summaries of investigations; items published in a newspaper or other publication; pencil or scratch pad notes; records; reports or summaries of negotiations; studies; brochures; pamphlets; circulars; press releases; contracts; notes; projections; all drafts of any documents; working papers; copies; marginal notations; photographs; drawings; checks; (front and back); tape recordings and transcripts thereof; video recordings; computer printouts; check stubs or receipts; letters and correspondence (including file copies thereof); any other documents or writings or papers or printed text of whatever description.

The term "document" is further defined to include any attachments or other matters affixed thereto.

As used herein, the term "document" means the original and any non-identical copy.

Any notations, comments or alterations on any copy render it non-identical and require production.

C. The materials enumerated in this request are, for the purpose of this request, to be considered to be such materials as may be in the actual possession of Moby's or in the possession of any person, firm or corporation acting on behalf of Moby's and/or from whom the Moby's has the right to request actual possession.

D. For any requested document as to which any claim of privilege is made or as to which

any claim of protection from discovery is made, identify the privilege or Rule upon which you rely, identify the document by date, author, addressee, present custodian, general subject matter, and location, and set forth the facts upon which such claim of privilege or protection is based.

E. These document requests are to be deemed continuing so as to require supplemental production if Moby's obtains or discovers further documents responsive to these requests after production has been made. Such supplemental production shall be made to Applicant's attorneys no later than five (5) days after such further documents come into Moby's custody, possession or control or are discovered by Moby's.

F. Each document produced in compliance with this request should be accompanied by an indication as to the particular paragraph(s) under which it is being produced.

G. Applicant reserves its right to supplement its First Request for the Production of Documents should additional information or documents become available.

DOCUMENTS TO BE PRODUCED

1. Samples of each and every label, packaging, promotional material, catalog, stationery, business card, and other documents showing the Whale Wash mark.

2. All documents relating to the advertisement and promotion of the Whale Wash mark.

3. To the extent not already produced, samples of all advertisements, promotional material, or other documents relating to advertisement and promotion of the Whale Wash mark by or on behalf of Moby's since the use of the Whale Wash mark began.

4. All documents describing how products bearing the Whale Wash mark are distributed, marketed, or otherwise disposed of to the public.

5. All documents relating to any trademark searches made in connection with the Whale Wash mark ever conducted by or on behalf of Moby's.

6. All documents relating to the first person or business concern to whom Moby's made a sale in association with the use of the Whale Wash mark.
7. All documents relating to the development and design of the Whale Wash mark.
8. All documents relating specifically to the product sold to the first person or business concern to whom Moby's made a sale in association with the use of the Whale Wash mark.
9. All documents relating specifically to the manner and format in which the Whale Wash mark was associated with the product sold to the first person or business concern to whom Moby's made a sale in association with the use of the Whale Wash mark.
10. All documents relating to any litigation or other conflict concerning the Whale Wash mark.
11. All documents relating to any person or business concern licensed or authorized to use the Whale Wash mark besides Moby's.
12. All documents relating to the extent of sales or other distributions, in both dollar value and in quantity of goods, by Moby's for each quarter year since use of the Whale Wash mark began, of goods identified by or associated with the Whale Wash mark.
13. All documents relating to the extent of sales or other distributions, in both dollar value and in quantity of goods, by anyone licensed or authorized by BBB to use the Whale Wash mark for each quarter year since the use of the Whale Wash mark began, of goods associated with the Whale Wash mark.
14. All documents indicating the cost or value of advertising and promotions on a yearly basis for each year since advertisement using the Whale Wash mark began.
15. All documents relating to any communications relating to any subject matter wherein such communications were intended to Applicant.

16. All communications from anyone relating to goods identified by or associated with the Opposer's mark, Whale Wash.

17. All documents evidencing any actual confusion by any person or business concern involving Opposer's and Applicant's use of the Whale Wash mark.

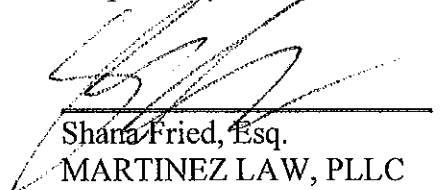
18. All documents evidencing, showing or tending to show, or which might lead to a belief as to the existence of any actual confusion between Opposer's and Applicant's use of the Whale Wash mark.

19. All documents relating to and generated as a result of the first awareness by Moby's of Applicant's use of the Whale Wash mark.

20. All documents and material which Moby's intends to introduce as evidence in this Proceeding.

Dated: December 1, 2008

Respectfully submitted,



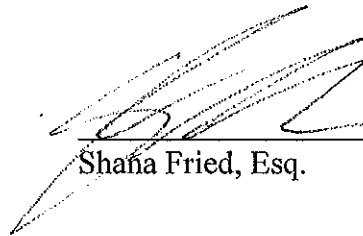
Shana Fried, Esq.
MARTINEZ LAW, PLLC
Attorneys for Applicant
76 Ninth Avenue, Suite 1110
New York, New York 10011
(212) 566-4500 (telephone)
(212) 566-4542 (fax)

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing First Request For
Production of Documents to be served upon:

James F. Keenan, Jr., Esq.
John G. Osborn, Esq.
BERNSTEIN, SHUR, SAWYER & NELSON
100 Middle Street
Portland, ME 04104

by placing same in an envelope, properly sealed and addressed, with postage prepaid and
depositing same with the United States Postal Service on this 1st day of December, 2008.



Shana Fried, Esq.

207 774-1200
207 774-1127
bernsteinshur.com

100 Middle Street
PO Box 9729
Portland, ME 04104-5029

BERNSTEIN SHUR

COUNSELORS AT LAW

James F. Keenan Jr.
207 228-7207 direct
jkeenan@bernsteinshur.com

September 6, 2007

Via Certified Mail, Return Receipt Requested

Whale Wash, LLC
10511 Ilona Avenue
Los Angeles, CA 90064

Re: WHALE WASH (U.S. Application Serial No. 77/205,602)

Dear Sir or Madam:

This office represents Moby's Auto Spa, Inc. It recently came to our attention that you filed an intent-to-use application with the U.S. Patent and Trademark Office ("USPTO") seeking to register the trademark WHALE WASH (see attached watch notice). Please be advised that our client has adopted and used a whale design and the slogan ONE WHALE OF A WASH® as part of its branding for several years and owns U.S. federal registrations for these and other marks (see attached).

We are concerned that your proposed use of the phrase WHALE WASH is likely to cause confusion among consumers and request that you contact this office immediately to discuss withdrawing your pending application and transitioning to a different brand. Although we are hopeful that we can resolve this in a manner that will cause your business as little disruption as possible, please understand that our client vigorously protects and enforces its intellectual property rights and considers this to be a serious matter.

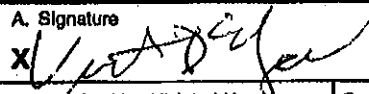
We appreciate your attention to this letter and look forward to hearing from you.

Sincerely,



James F. Keenan, Jr.

JFK/dmp
Enclosures

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 		A. Signature  <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: Whale Wash, LLC 10511 Ilona Avenue Los Angeles, CA 90064		B. Received by (Printed Name) Victor Eliza C. Date of Delivery 9-10-07 D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input checked="" type="checkbox"/> No	
		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	

2. Article Number
(Transfer from service label) **7006 2760 0003 5596 6183**

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

UNITED STATES POSTAL SERVICE



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

James F. Keenan, Jr., Esq.
Bernstein Shur
100 Middle Street, P.O. Box 9729
Portland, ME 04104-5029

34960-1

Moby's Auto Spa



Hits Overview

Hit No.	Trademark	Database	Status	Class	Goods and Services	Owner Name
US-1	<u>WHALE WASH</u>	U.S. Federal	PENDING Intent to Use	37	(INT. CL. 37) CAR WASHING	WHALE WASH, LLC

Full Text Record(s)

WHALE WASH	US-1
<p>Image</p> <p>Whale Wash</p>	
Trademark	WHALE WASH
Cross References	WHALE WATCH
Design Type	BLOCK LETTERS
Database	U.S. Federal
Application Number	77205602
Status	PENDING Intent to Use
USPTO Status	(630) NEW APPLICATION - RECORD INITIALIZED NOT ASSIGNED TO EXAMINER
USPTO Status Date	19-JUN-2007
Filed	13-JUN-2007
International Class(es)	37 (Construction and repair services)
Goods and Services	(INT. CL. 37) CAR WASHING
Applicant	WHALE WASH, LLC NEVADA LIMITED LIABILITY CO. 10511 ILONA AVENUE LOS ANGELES, CALIFORNIA 90064
Correspondent Info	WHALE WASH, LLC WHALE WASH, LLC 10511 ILONA AVENUE LOS ANGELES, CA 90064
History	19-JUN-2007 NEW APPLICATION ENTERED IN TRAM

Owner Index

WHALE WASH	WHALE WASH, LLC <u>Ref. US-1</u>
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IN THE UNITED STATES PATENT AND TRADEMARK
OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application Serial No. 77205602

Filed By WHALE WASH, LLC on June 13, 2007

For the mark WHALE WASH

-----X

MOBY'S AUTO SPA, INC.

Opposer,

Opposition No.:
91183140

-against-

WHALE WASH, LLC.

Applicant.

-----X

APPLICANT'S FIRST SET OF INTERROGATORIES

The Applicant, WHALE WASH, LLC ("Applicant"), by its attorneys, MARTINEZ LAW, PLLC, as and for its First Set of Interrogatories pursuant to the provisions of TBMP §405.04, hereby requests from MOBY'S AUTO SPA, INC. ("Moby's"), the production of the following communications, documents and files, on or before thirty (30) days after service.

A. Moby's means Opposer, its predecessors or assignors, affiliated and related companies, and employees, agents or representatives of Moby's.

B. As used herein, the term "document" is used in the broadest sense and includes, but is not limited to, the following items, whether hand-written or typed or printed or recorded or reproduced by any process, namely: agreements; communications (including intra-company communications); memos; statements; notes (whether formal or informal); correspondence;

telegrams; cables; telexes, faxes; telephonically transmitted tangible communications; memoranda; records; books; summaries or records of telephone conversations; telephone message slips (including those which indicate only that a call was received or made); summaries or records of conversations or interviews; diaries; appointment books; desk calendars; wall calendars; forecasts; statistical statements; accountants work papers; graphs; charts; accounts; minutes or records of meetings or conferences; reports and/or summaries or interviews; reports and/or summaries of investigations; items published in a newspaper or other publication; pencil or scratch pad notes; records; reports or summaries of negotiations; studies; brochures; pamphlets; circulars; press releases; contracts; notes; projections; all drafts of any documents; working papers; copies; marginal notations; photographs; drawings; checks; (front and back); tape recordings and transcripts thereof; video recordings; computer printouts; check stubs or receipts; letters and correspondence (including file copies thereof); any other documents or writings or papers or printed text of whatever description. The term "document" is further defined to include any attachments or other matters affixed thereto. As used herein, the term "document" means the original and any non-identical copy. Any notations, comments or alterations on any copy render it non-identical and require production.

C. When used with reference to a person, the term "Identify" means to state the person's full name, address, telephone number, occupation, employer and business address.

D. When used in reference to a document, the term "Identify" means to state the date, author(s), addressee(s) of the document, and name and address of present custodian of the document.

E. If you find the meaning of any term in these interrogatories to be unclear, please assume a reasonable meaning, state what the assumed meaning is, and respond to the interrogatory based upon that assumed meaning.

F. In the event that you claim that an interrogatory is overly broad, unduly burdensome,

irrelevant, or otherwise objectionable, please respond to that portion of the interrogatory that is unobjectionable and specifically identify the respect in which the interrogatory is allegedly overly broad, unduly burdensome, irrelevant, or otherwise objectionable.

G. If information or knowledge called for is withheld from discovery on a claim that it is privileged or subject to protection as trial preparation or work product material, or on any other basis, the claim shall be made expressly and shall be supported by a description of the nature of the document(s), communications or things not produced that is sufficient to enable Plaintiff to contest the claim, including:

- a. An identification of the document with reasonable specificity and particularity, including its nature (memo, letter, etc.) author, addressee, title, and date;
- b. Each person who as seen or received or is likely to have seen or reviewed the document;
- c. The exact nature of the privilege asserted; and
- d. All of the facts upon which your claim of privilege is based or which supports said claim.

H. For any requested document as to which any claim of privilege is made or as to which any claim of protection from discovery is made, identify the privilege or rule upon which you rely, identify the document by date, author, addressee, present custodian, general subject matter, and location, and set forth the facts upon which such claim of privilege or protection is based.

I. These interrogatories are to be deemed continuing so as to require supplemental responses if Moby's obtains or discovers further documents responsive to these requests after production has been made. Such supplemental production shall be made to Applicant's attorneys no

later than five (5) days after such further documents or information come into Moby's custody, possession or control or are discovered by Moby's.

J. Applicant reserves its right to supplement its First Set of Interrogatories should additional information or documents become available.

INTERROGATORIES

1. Identify the date, on or about which Moby's first considered providing services under the Whale Wash mark.

2. Identify the date Moby's first provided services in connection with the Whale Wash mark, and whether this date preceded or was subsequent to its application for registration of the Whale Wash mark with the USPTO.

3. Identify the date Moby's first used the Whale Wash mark.

4. Identify the goods and/or services provided by Moby's under the Whale Wash mark at the time of Moby's first use of the Whale Wash mark.

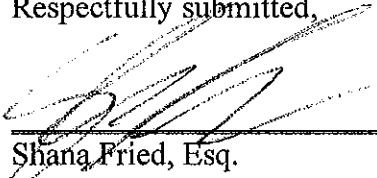
5. Identify all goods and/or services that Moby's currently sells and/or advertises, or intends to sell and/or advertise under the Whale Wash mark.

6. Identify all channels of trade through which Moby's has sold and/or advertised, or intends to sell and/or advertise its goods and/or services under the Whale Wash mark.

7. Identify all geographic areas in which Moby's has sold and/or advertised, or intends to sell and/or advertise its goods and services under the Whale Wash mark.

Dated: December 1, 2008

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Shana Fried', is written over a horizontal line.

Shana Fried, Esq.

MARTINEZ LAW, PLLC

Attorneys for Applicant

76 Ninth Avenue, Suite 1110

New York, New York 10011

(212) 566-4500 (telephone)

(212) 566-4542 (fax)

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing First Set of Interrogatories to be served upon:

James F. Keenan, Jr., Esq.
John G. Osborn, Esq.
BERNSTEIN, SHUR, SAWYER & NELSON
100 Middle Street
Portland, ME 04104

by placing same in an envelope, properly sealed and addressed, with postage prepaid and depositing same with the United States Postal Service on this 1st day of December, 2008.



Shana Fried, Esq.